

ORIGINAL

NEW APPLICATION



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Arizona Corporation Commission

BEFORE THE ARIZONA CORPORATION COMMISSION DOCKETED

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KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

E-01891A-09-0377

IN THE MATTER OF THE PETITION OF
GARKANE ENERGY COOPERATIVE, INC.
FOR A DECLARATORY ORDER

Docket No. E-01891A-09-_____

**PETITION FOR
DECLARATORY ORDER**

GALLAGHER & KENNEDY, P.A.
2575 E. CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-9000

Garkane Energy Cooperative, Inc. ("Garkane" or the "Cooperative"), a nonprofit Utah-domiciled, member-owned cooperative, requests that the Commission issue its declaratory order confirming that certain Arizona statutes regarding Commission approval of financing and encumbrances are not applicable to Garkane. Alternatively, and without waiver of its position that Commission approval of its financings and related encumbrances is not required, Garkane requests that the Commission issue an order retroactively approving certain secured loan transactions and a mortgage previously entered into by Garkane.

In support of its petition, Garkane states as follows:

1. Garkane is a Utah non-profit cooperative association headquartered in Loa, Utah. Garkane is a public utility subject to the jurisdiction of the Public Service Commission of Utah ("Utah PSC"). Garkane supplies electricity to its members—the vast majority of whom are located in the State of Utah.

2. In Decision No. 38446 dated April 4, 1966, the Commission granted the Cooperative a Certificate of Convenience and Necessity to provide electric utility services in

1 Arizona. Garkane currently serves approximately 1400 members in northern Arizona near the
2 Utah border.

3 3. In Decision No. 70979 dated May 5, 2009 (the "Decision"), the Commission
4 approved the extension of Garkane's Certificate of Convenience and Necessity to provide service
5 to Colorado City, Arizona. In that decision, the Commission also ordered Garkane to file this
6 petition concerning the Commission's jurisdiction over Garkane's debt financing under A.R.S.
7 § 40-301, *et seq.*, and Garkane's debt-related encumbrances under A.R.S. § 40-285 in light of
8 Garkane's status as a foreign public service corporation engaged in interstate commerce.
9 (Decision, Finding 21 and First Ordering Paragraph, p. 17.)

10 4. As acknowledged by the Commission in the Decision, the business activities of
11 Garkane are of a nature and character constituting interstate commerce. Specifically, Garkane's
12 interstate business activities include:

- 13 a. Purchasing electric energy from plants located in different states;
- 14 b. Operating electricity generation plants, transmission lines and distribution
15 facilities in Utah and Arizona;
- 16 c. Transmitting and distributing electric energy across state boundaries to
17 members/customers in Utah and Arizona; and
- 18 d. Providing administrative, accounting, engineering and other services to
19 Garkane's operating divisions and facilities in Utah and Arizona.

20 *See* Affidavit of Ira Mike Avant, which is attached hereto as Exhibit A.

21 5. As a nonprofit cooperative, Garkane's requirement for debt financing to carry on
22 the business of providing these interstate utility and energy services in Utah and Arizona is a
23 very essential part of its operations. *See* Affidavit of Stan Chappell, attached hereto as

1 Exhibit B. As a member-owned cooperative, Garkane does not raise necessary capital by issuing
2 stock.

3 6. Garkane's debt and loan transactions are regulated by the Utah PSC. Further, the
4 financial transactions at issue in this petition which are detailed in Exhibit 1 to Exhibit B have
5 been reviewed and approved by the Utah PSC.

6 7. As explained in greater detail in the Memorandum of Points and Authorities
7 attached hereto as Exhibit C, the Commission's exercise of regulatory jurisdiction over
8 Garkane's debt financing and encumbrances in relation to these loans would create an
9 impermissible burden on interstate commerce in violation of the United States Constitution. For
10 three decades, the Commission has consistently declined jurisdiction over similar debt financings
11 of foreign public service corporations. Further and specifically as to Garkane, in 1999, the then
12 Chief Counsel of the Commission's Legal Division confirmed that the Commission did not have
13 jurisdiction over "Garkane's debt and lien matters." See Exhibit D.

14 WHEREFORE, Garkane requests that the Commission enter its Order confirming that
15 A.R.S. § 40-301, *et seq.*, and A.R.S. § 40-285 in relation to the Cooperative's secured loan
16 transactions are not applicable to Garkane. Alternatively, and without waiver of this
17 jurisdictional position, Garkane requests that the Commission enter its Order retroactively
18 approving the credit facilities and mortgage described in Exhibit 1 to Exhibit B.

RESPECTFULLY SUBMITTED this 30th day of July, 2009.

GALLAGHER & KENNEDY, P.A.

By

Michael M. Grant
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Garkane Energy Cooperative, Inc.

**Original and 13 copies filed this
30th day of July, 2009, with:**

**Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007**

Copy of the foregoing delivered
this 30th day of July, 2009, to:

Janice Alward
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

10703-4/2136120

EXHIBIT A

AFFIDAVIT OF IRA MIKE AVANT

STATE OF UTAH)
) ss.
County of Kane)

IRA MIKE AVANT, being first duly sworn, states under oath that:

1. I am the Engineering Manager for Garkane Energy Cooperative Inc. ("Garkane").

As such, I have personal knowledge of the matters set forth herein.

2. Garkane purchases electric energy from plants located in different states.

3. Garkane owns and operates electricity generation plants, transmission lines and distribution facilities in Utah and Arizona.

4. Garkane transmits electric energy across state boundaries to its members/customers in Utah and Arizona.

5. Garkane provides administrative, accounting, engineering and other services to its operating divisions and facilities in Utah and Arizona.

Ira Mike Avant
Ira Mike Avant

SUBSCRIBED AND SWORN to before me this 23 day of July, 2009, by Ira Mike Avant.

Rebecca L. Hunt
Notary Public

My Commission Expires:

7/7/12
2136618v2/10703-4

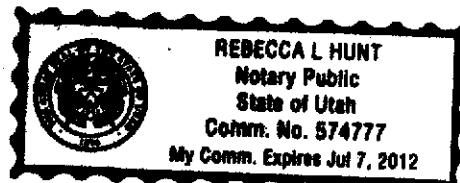


EXHIBIT B

1 appropriate for and consistent with the proper performance by Garkane of its services as a public
2 utility; and they have not and will not impair Garkane's ability to perform those services.

3
4 Stan Chappell
Stan Chappell

5
6 SUBSCRIBED AND SWORN to before me this 23 day of July, 2009, by Stan Chappell.

7 Amelia Blackburn
8 Notary Public

9 My Commission Expires:

10 5-06-11
2137260v2/10703-4

EXHIBIT 1
TO AFFIDAVIT OF STAN CHAPPELL

1. Restated Mortgage and Security Agreement between and among RUS, CFC and Garkane dated November 1, 1999.
2. Loan Agreement in the amount of \$10 million between CFC and Garkane dated December 22, 2003.
3. Loan Agreement in the amount of \$15 million between CFC and Garkane dated October 29, 2007.
4. Substitute Secured Promissory Note in the amount of \$4.5 million between CFC and Garkane dated April 22, 2009.
5. \$5 Million Revolving Line of Credit between CFC and Garkane dated May 18, 2009.

EXHIBIT C

Garkane Energy Cooperative, Inc. (“Garkane” or the “Cooperative”) submits this Memorandum of Points and Authorities in support of its Petition for Declaratory Order confirming that A.R.S. § 40-301, *et seq.*, and A.R.S. § 40-285 do not require the Commission to approve the Cooperative’s financings and mortgage encumbrances. Specifically, this Memorandum is submitted pursuant to the Commission’s Decision No. 70979 dated May 5, 2009, in which Garkane was ordered to provide additional briefing on the application of these statutes to foreign public service corporations engaged in interstate commerce.

Over many years, the Commission has had several opportunities to consider the application of A.R.S. § 40-301, *et seq.*, to foreign public service corporations which are engaged in interstate commerce. On each occasion the Commission has disclaimed jurisdiction. *See*, for example, Decision No. 51727 concerning Citizens (January 16, 1981); Decision No. 52244 concerning Southern Union (June 18, 1981); Decision No. 53560 concerning Southwest Gas (May 18, 1983); and Decision No. 61895 concerning PHASER, a division of Public Service Company of New Mexico (August 27, 1999). In so ruling, the Commission relied primarily upon an Opinion of the Arizona Attorney General (Opinion No. 69-10) in which the Attorney General concluded that these statutes only applied to domestic corporations and that the Commission did not have jurisdiction over a foreign corporation's financings.

Further, in addition to citing Attorney General Opinion No. 69-10, the 1999 PHASER ruling also stated that “[i]t is the opinion of the Commission’s Legal Division that Commission approval is not required for the issuance of securities by foreign corporations that are engaged in

1 interstate commerce.” (Finding 17, Decision No. 61895.) Consistent with that statement, a few
2 months before issuance of the PHASER decision, Garkane’s counsel had discussed and
3 confirmed with the then Chief Counsel of the Legal Division the conclusion that the Commission
4 did not have jurisdiction over “Garkane’s debt and lien matters.” A copy of the letter confirming
5 the conclusions reached in that discussion is attached to the Petition for Declaratory Order as
6 Exhibit D.

7 In its recent decision approving Garkane’s extension of its service territory to Colorado
8 City, the Commission indicated that Garkane should make this filing and discuss whether
9 Attorney General Opinion 69-10 remained authoritative on the issue of its jurisdiction under
10 A.R.S. § 40-301, *et seq.*, in light of the fact that the Opinion was issued prior to the addition of
11 subsection (D) to A.R.S. § 40-301 in 1971. *See* Decision No. 70979, Finding 21 and footnote 6,
12 p. 6. Subsection (D) states that A.R.S. § 40-301, *et seq.*, shall not apply to foreign public service
13 corporations whose physical facilities are used in providing communications service in interstate
14 commerce. It does not specifically mention electric, gas or other utility service providers.

15 The legislature’s enactment of subsection (D) two years after issuance of the 1969
16 Attorney General Opinion clearly does not invalidate the precedent set by the Commission’s
17 prior, repeated jurisdictional disclaimers. Each of the Commission decisions concluding it did
18 not have jurisdiction over other utility service providers’ finance issues followed that legislative
19 amendment. *See Dupnik v. MacDougall*, 136 Ariz. 39, 44, 664 P.2d 189, 194 (1983) (where
20 there has been a history of acquiescence in the meaning of a law, it will not be disturbed unless
21 manifestly erroneous). Subsection (D) was added to A.R.S. § 40-301 in 1971 and was part of the
22 statute at the time that the Commission issued its rulings of “no jurisdiction” over electric, gas
23 and other service providers in 1981, 1983 and 1999.

1 The Commission's jurisdictional analysis has consistently been based on federal
2 constitutional grounds – not the statutory exclusion. Specifically, citing the Opinion of the
3 Arizona Attorney General and multiple state courts, the Commission has repeatedly recognized
4 that its regulatory supervision over the financings of foreign public service corporations who are
5 engaged in interstate commerce “would create an impermissible burden on interstate commerce
6 in violation of the United States Constitution.” Decision No. 51727 at 3; Decision No. 52244
7 at 4; Decision No. 53560 at 3; and Decision No. 61895 at 2.

8 Here, the Commission's regulation over Garkane's financings would similarly violate the
9 Commerce Clause. Courts have long recognized that a public service company's ability to
10 obtain financing has a significant and direct impact on its ability to deliver service, operate and
11 exist. The additional administrative burdens and chaos resulting from requiring utilities to obtain
12 financing approval from multiple states (with possibly differing approval standards and
13 conflicting conditions) outweighs any benefits or interests that the state may have in regulating
14 such issues. *See United Air Lines, Inc. v. Illinois Comm. Com'n.*, 207 N.E.2d 433, 438 (1965);
15 *State v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 550 (1975); *Panhandle E. Pipe Line Co.*
16 *v. Public Util. Comm'n of Ohio*, 383 N.E.2d 1163 (Ohio 1978) (application of financing pre-
17 approval requirement to foreign utility company violated commerce clause); *ANR Pipeline Co. v.*
18 *Schneidewind*, 801 F.2d 228 (6th Cir.1986) (Michigan statute requiring foreign public utilities to
19 seek approval of securities issuance was unconstitutional).

20 The Commission's repeated conclusions that it should not regulate the financings of
21 foreign public service corporations pursuant to A.R.S. § 40-301, *et seq.*, are well-founded. That
22 same analysis and outcome should continue to be applied to Garkane.
23

1 **II. The Commission Should Apply the Same Consistent and Constitutional**
2 **Interpretation to A.R.S. § 40-285.**

3 In the Colorado City CC&N decision, the Commission also requested analysis of its
4 possible jurisdiction to regulate Garkane's debt-related mortgages or encumbrances under
5 A.R.S. § 40-285—even if it did not have A.R.S. § 40-301 jurisdiction over the issuance of the
6 debt itself. *See* Decision No. 70979 at pp. 6-7, footnote 6. However, that interpretation would
7 be contrary to Arizona case law on statutory construction and would also violate the same
8 constitutional principles just discussed.

9 The statute states:

10 A public service corporation shall not sell, lease, assign, mortgage
11 or otherwise dispose of or encumber the whole or any part of its
12 railroad, line, plant or system necessary and useful in the
performance of its duties to the public . . . without first having
secured from the commission an order authorizing it so to do.

13 A.R.S. § 40-285(A). On its face, the language would appear to require all public service
14 corporations, domestic and foreign, to obtain approval of the Commission prior to
15 “encumbering” (or mortgaging) a necessary and useful asset. However, this provision must be
16 read in conjunction with A.R.S. § 40-301 which, as discussed above, more specifically addresses
17 Commission regulation of a public service corporation’s “notes and other evidences of
18 indebtedness” as well as the creation of “liens on [its] property located within this state.”

19 Because both statutes relate to a company’s ability to pledge its assets, they must be
20 interpreted consistently and harmoniously. *See In re Stephanie N.*, 210 Ariz. 317, 320, 110 P.3d
21 1280, 1283 (App. 2005) (interpreting statutes relating to jurisdiction over juvenile probation
22 cases); *Yarbrough v. Montoya-Paez*, 214 Ariz. 1, 7, 147 P.3d 755, 761 (App. 2006) (interpreting
23 potentially conflicting statutes regarding venue changes). An interpretation of A.R.S. § 40-285

1 giving the Commission jurisdiction over lending transactions which also involve issuance of a
2 mortgage would be directly contrary to the established interpretation that Commission
3 jurisdiction over those same transactions under A.R.S. § 40-301 is unconstitutional. In other
4 words, it would not make sense that the Constitution prohibits jurisdiction over Garkane's
5 financing transactions under A.R.S. § 40-301 while, at the same time, allowing jurisdiction over
6 the security required as an integral part of those same transactions. Rather, a harmonious
7 interpretation limits the Commission's lien jurisdiction under both statutes to domestic public
8 service corporations only—not foreign corporation financing transactions where debt/mortgage
9 issues are involved.

10 A.R.S. § 40-285 applies to all of the various transactions identified, except foreign utility
11 transactions that involve a lien or mortgage in conjunction with a financing transaction under
12 § 40-301. This statutory construction follows the principle that, where statutes conflict, effect is
13 given to the more specific statute while still adhering to the intent of the more general statute.
14 *See Backus v. State*, 203 P.3d 499, 502 (2009) (interpreting phrase in notice of claim statute in
15 light of overall statutory scheme); *Friedemann v. Kirk*, 197 Ariz. 616, 618, 5 P.3d 950, 952
16 (App. 2000) (applying principle that where a general and a specific statute conflict, “we treat the
17 specific statute as an exception to the general, and the specific statute controls”).

18 Here, A.R.S. § 40-285 generally addresses all transactions which could involve a public
19 service corporation's transfer of possession of, or rights to, necessary and useful property. The
20 purpose of the statute is “to prevent looting of a utility's facilities and impairment of service to
21 the public” that would result therefrom. *Babe Inv. v. Arizona Corp. Comm'n*, 189 Ariz. 147,
22 151, 939 P.2d 425, 429 (App. 1997) (Commission did not have jurisdiction over property that
23 was not useful or necessary). But, much more specifically than § 40-285, A.R.S. § 40-301 is

1 aimed precisely at a public service corporation's need to raise funds by obtaining, among other
2 things, debt financing secured by a lien or mortgage.

3 Thus, A.R.S. § 40-285, as the more general statute, yields to the established interpretation
4 of the more precise statute, A.R.S. § 40-301.A, which specifically concerns "notes" and
5 associated "liens on property within this state." Construing A.R.S. § 40-285 as not applying to
6 lien transactions that are more specifically addressed by A.R.S. § 40-301 gives effect to the
7 former statute's purpose because the Commission will retain authority (pursuant to A.R.S.
8 § 40-285) over transactions involving the disposition of a utility's assets.

9 Finally, A.R.S. § 40-285 should be interpreted in a manner that preserves its
10 constitutional validity. *See Phoenix Newspapers, Inc. v. Superior Court*, 180 Ariz. 159, 163,
11 882 P.2d 1285, 1288 (App. 1993) ("If a statute is susceptible to two interpretations, one of which
12 renders it unconstitutional, we must adopt the interpretation favoring its validity."). The
13 Commission has repeatedly held that its exercise of jurisdiction over the ability of a foreign
14 corporation engaged in interstate commerce to obtain financing creates an impermissible burden
15 on interstate commerce. Likewise, interpreting A.R.S. § 40-285 as empowering the Commission
16 to approve the mortgages and liens which are necessary to obtain Garkane's loans and credit
17 facilities would also violate the Commerce Clause.

18 CONCLUSION

19 Consistent with its longstanding administrative orders, case law and principles of
20 statutory construction, the Commission should issue its Order confirming that A.R.S. § 40-301,
21 *et seq.*, and A.R.S. § 40-285 do not apply to Garkane's secured loan transactions.

EXHIBIT D

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION

MICHAEL M. GRANT
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DIRECT LINE
(602) 530-8291

2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000
FAX: (602) 257-9459

April 8, 1999

Christopher Kempley, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Re: Garkane Power Association, Inc. ("Garkane")

Dear Chris:

As we discussed, the purpose of this letter is briefly to memorialize the conclusions we reached this week on lack of Commission jurisdiction over Garkane's debt and lien matters.

Garkane is a Utah nonprofit cooperative corporation. It owns facilities and supplies electricity in both Arizona and Utah. More than 90% of its member owners are in Utah.

Garkane is currently in the process of applying for an RUS guaranteed loan. Because Garkane is a foreign corporation engaged in interstate commerce which owns facilities in more than one state, Commission approval is not required because of interstate commerce clause restrictions. Op. Atty. Gen. No. 69-10.

I appreciate your attention to this matter. If I have misunderstood or misstated our conclusions, please call. Otherwise, Garkane will not seek Commission approval for this current or any future loan application.

Very truly yours,



By
Michael M. Grant

cc: Mr. Carl Albrecht

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